

CANADA / JUDGMENT

Devathasan v. Devathasan

2020 BCCA 209

COURT

British Columbia Court of Appeal

DECIDED

8 May 2020

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2020 BCCA 209 Devathasan v. Devathasan

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Devathasan v. Devathasan,

2020 BCCA 209

Date: 20200508

Docket: CA46267

Between:

Christie Kanti Devathasan

previously known as Kanti Devi d/o Ramnath Rai

Respondent

(Claimant)

And

Gobinathan Devathasan

aka Devathasan s/o Gobinathan Nair

Appellant

(Respondent)

Before:

The Honourable Madam Justice Griffin

(In Chambers)

On appeal from: Orders of the Supreme Court of British Columbia, dated April 29, 2019 (Devathasan v. Devathasan, 2019 BCSC 661, Vancouver Docket E161957) and July 4, 2019 (Devathasan v. Devathasan, 2019 BCSC 1357, Vancouver Docket E161957).

Oral Reasons for Judgment

Counsel for the Appellant

(via teleconference):

N. Nasser

Counsel for the Respondent

(via teleconference):

L.N. MacLean, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia

May 8, 2020

Place and Date of Judgment:

Vancouver, British Columbia

May 8, 2020

Summary:

The respondent applies for an order that the underlying appeal be dismissed as abandoned for the failure of the appellant to comply with the conditions of an order extending time for the filing and serving of the notice of appeal, and filing of the appeal record and transcripts. Held: Application granted, appeal dismissed as abandoned. A single justice in Chambers has jurisdiction to dismiss an appeal as abandoned due to failure to meet the conditions of an extension of time order, pursuant to s. 10(2)(e) of the Court of Appeal Act. The appellant has a long history of non-compliance with court orders. His argument that he is unable to meet the conditions of the order for extension of time were previously rejected and the appellant has simply made choices not to comply with the order. The appellant has no reasonable explanation for his non-compliance with the order, that would change the balance of the interests of justice.

GRIFFIN J.A. (via teleconference):

Overview

- [1] The respondent, Christie Devathanan (the "respondent" or "Ms. Devathanan"), applies for an order pursuant to s. 10(2)(e) of the Court of Appeal Act, R.S.B.C. 1996, c. 77 [Act], that the underlying appeal be dismissed as abandoned for the failure of the appellant, Gobinathan Devathanan (the "appellant" or "Dr. Devathanan"), to comply with an order extending time.
- [2] The application relates to non-compliance by Dr. Devathanan with various orders of this Court imposed by Justice Garson as a condition of granting him extensions of time to file and serve the notice of appeal, and file the appeal record and transcripts.
- [3] Initially the application was also brought pursuant to s. 24(2) of the Act, based on the appellant's failure to post security for costs in compliance with the same order of Garson J.A. However, the appellant has since posted the security for costs.

Background

- [4] The underlying appeal arises out of a family law dispute concerning the division of substantial assets, as well as spousal and child support under the Family Law Act, S.B.C. 2011, c. 25.
- [5] In reasons indexed at 2019 BCSC 661, as well as supplementary reasons at 2019 BCSC 1357, Justice Gomery found that the total family assets were worth approximately \$39 million, and included several properties located in British Columbia, Ontario, Singapore, Malaysia, Thailand, and Florida. The judge apportioned the family property between the parties, with all of the North American properties going to Ms. Devathanan. He further ordered that Dr. Devathanan make several payments to Ms. Devathanan in relation to child support, spousal support, an equalization payment, and special costs due to Dr. Devathanan's misconduct during the litigation, amounting to approximately \$10,000,000 in total.
- [6] The trial judgment was pronounced on April 29, 2019, with supplementary reasons following on July 4, 2019, after the parties made further submissions.
- [7] Dr. Devathanan filed a notice of appeal on July 30, 2019, and served it on the respondent on August 8, 2019. As this was beyond the 30-day time limit to bring an appeal, based on the April 29, 2019 judgment date, Dr. Devathanan sought an extension of time for filing and serving the appeal. He also sought an extension of time to file the appeal record and transcripts. His application was heard by Garson J.A. on November 21, 2019.
- [8] In reasons indexed at 2019 BCCA 436 (Chambers), Garson J.A. granted the extension of time, subject to the appellant complying with certain conditions. She found at least some evidence that Dr. Devathanan had formed a bona fide intention to appeal within the appropriate time limit, and that he had informed Ms. Devathanan of this on July 10, 2019. Considering the merits of the appeal, Garson J.A. noted that Dr. Devathanan raised several grounds of appeal, including that the trial judge erred in failing to account for the effect of the equalization payment in ordering spousal support. She was satisfied that this ground, among others, was

at least arguable.

- [9] Justice Garson then noted Dr. Devathasan's significant misconduct in the litigation, which Gomery J. described in his reasons for judgment. Justice Garson found there was "ample evidence that Dr. Devathasan continues to disparage the judiciary and justice system, refuses to comply with or frustrates court orders, and declines to satisfy any part of the order made by Justice Gomery": at para. 26. However, aside from his non-compliance with the order under appeal, Garson J.A. noted that most of his misconduct occurred prior to the trial judgment: at para. 28.
- [10] Justice Garson found that Ms. Devathasan would be prejudiced by further delay due to Dr. Devathasan's failure to comply with the order. However, given that there were arguable grounds of appeal, she concluded this prejudice could be ameliorated by imposing conditions amounting to partial compliance with Gomery J.'s order. Accordingly, she granted an extension of time, but imposed the following conditions on Dr. Devathasan pursuant to s. 10(2)(f) of the Act:
- a) Within seven business days, Dr. Devathasan was to:
 - i. remove the certificates of pending litigation ("CPL") against certain properties described in Gomery J.'s order; and
 - ii. transfer his interest in a property described as 1091 Groveland (the "Groveland property") to Ms. Devathasan.
 - b) Within 30 days, Dr. Devathasan was to pay:
 - i. \$500,000 to Ms. Devathasan towards the special costs judgment;
 - ii. \$12,000 into court as security for costs of the appeal; and
 - iii. \$2,500 to Ms. Devathasan as costs of the application.
 - c) Within 45 days, Dr. Devathasan was to pay \$450,000 to Ms. Devathasan for the non-resident taxes payable in order to transfer the Groveland property.
- [11] Justice Garson ordered that the appeal was stayed pending Dr. Devathasan's compliance with the above orders. She further ordered that if any one or more of the conditions were not met, on or after 45 days, Ms. Devathasan would be free to apply, on two business days' notice, to a single justice in chambers to dismiss the appeal for failure to comply with the order.
- [12] On March 20, 2020, Ms. Devathasan filed the present notice of motion seeking to have the appeal dismissed for Dr. Devathasan's non-compliance with Garson J.A.'s order. At that time, Dr. Devathasan had only complied with two of the conditions in the order:
- a) the Form A Transfer for the Groveland property; and

- b) removal of the CPLs against the relevant properties.
- [13] Dr. Devathanan applied to vary the order of Garson J.A. pursuant to s. 9 of the Act. His application was heard by a division on April 2, 2020. In reasons indexed at 2020 BCCA 115, the division dismissed the application. Notably, the division rejected Dr. Devathanan's argument that he was unable to meet the financial conditions of Garson J.A.'s order, finding that Garson J.A. had considered his ability to pay in making the order.
- [14] However, the division granted Dr. Devathanan an extension until April 17, 2020, to comply with the conditions of Garson J.A.'s order. Failing such compliance, Ms. Devathanan would be in a position to make "whatever application she may consider appropriate."
- [15] Dr. Devathanan subsequently paid the required security for costs of the appeal into court, namely \$12,000; and paid the ordered \$2,500 in costs to the respondent.
- [16] Dr. Devathanan continues to fail to comply with two conditions of the extension of time order, which he was to meet before the April 17, 2020 deadline:
- a) he has failed to pay to the respondent the \$450,000 non-resident taxes; and
 - b) he has failed to pay to the respondent the \$500,000 towards the special costs judgment.
- [17] The respondent's March 20, 2020 motion is now back before the Court, relying on the appellant's failure to comply with the above two conditions of the extension of time order as the basis for an order to dismiss the appeal as abandoned.
- [18] The appellant belatedly filed a lengthy affidavit yesterday, May 7, 2020. The respondent is not objecting to the Court considering it as it contains admissions regarding some of the appellant's activities regarding the sale of properties in Singapore. The respondent filed a responsive affidavit of Ms. Banus (paralegal to the counsel for the respondent) today, May 8, 2020, to which the appellant has not objected.

Analysis

- [19] It is clear that the appellant has not complied with the order of Garson J.A. extending time for the appeal.
- [20] The appellant makes three arguments as to why this should not result in the dismissal of the appeal as abandoned:
- a) first, the appellant argues that a single justice in chambers does not have jurisdiction to grant the order;
 - b) second, the appellant argues that it would be preferable for a full division of the Court to consider the application at the hearing of the appeal proper, after considering all of the merits of the appeal; and

- c) third, the appellant argues that he had financial difficulty complying with the order, but suggests that he might be able to comply with it in the future at some unknown date.

Jurisdiction

- [21] Dealing with the first argument, the appellant submits that I do not have jurisdiction, as a single justice in chambers, to grant the relief of dismissing the appeal as abandoned. In this regard, he relies on *First Majestic Silver Corp. v. Santos*, 2014 BCCA 115.
- [22] However, *First Majestic* dealt with an application to dismiss an appeal on the basis that the appellant had not complied with an order to post security for the trial judgment. The *First Majestic* order at issue did not have anything to do with an extension of time for an appeal. The Court in *First Majestic* noted that the Court of Appeal is a creature of statute (the Act), and the jurisdiction of a single justice in the Court of Appeal must be found in the statute. There was nothing in the Act which allowed for a single justice to dismiss an appeal for non-compliance with the type of order at issue in *First Majestic*, an order to post security for the trial judgment.
- [23] Section 10(2)(e) of the Act provides a single justice power to dismiss an appeal as abandoned where the appellant has failed to comply with provisions of the Act, the Court of Appeal Rules, B.C. Reg. 297/2001, or an order extending or shortening the time for the doing of an act or taking of a proceeding.
- [24] Section 28 of the Act provides:
- 28 If a party fails to comply with this Act or the rules, the court or a justice may
- (a) dismiss the appeal as abandoned if the party is the appellant,
- [25] As held in *First Majestic*:
- [23] On the plain words of ss. 10(2)(e) and 28(a), it is not obvious that a single justice has the authority to dismiss an appeal other than in the named circumstances: for non-compliance with the Act or Rules or when the order in question extends or shortens time.
- [Emphasis added.]
- [26] Thus, *First Majestic* held that the Act did not give a single justice in chambers jurisdiction to dismiss an appeal for simply non-compliance with an order, unless that order was one mentioned specifically in the Act, such as s. 10(2)(e): an order extending or shortening time.
- [27] I note that jurisdiction also exists pursuant to s. 24(2) of the Act for a justice to dismiss as abandoned an appeal of an appellant who fails to comply with an order for the payment of security for costs of the appeal.

- [28] Here, Garson J.A.'s order was for extensions of time to allow the appellant to file and serve his notice of appeal, and to file the appeal record and transcripts, and the conditions she imposed were conditions in relation to the granting of the extensions of time, pursuant to ss. 10(1) and 10(2)(f) of the Act.
- [29] I, therefore, conclude I do have jurisdiction pursuant to s. 10(2)(e) of the Act to grant the relief sought, based on the appellant's non-compliance with the order of Garson J.A. extending time.

Defer the Matter to the Hearing of the Appeal

- [30] The appellant's second argument is that it would be preferable for the division hearing the appeal itself to decide whether the appellant's non-compliance with the order extending time should result in dismissal of the appeal. If this matter is deferred, the appellant argues that the division hearing the appeal will have read the factums and then be familiar with the merits of the appeal.
- [31] Respectfully, this misses the point. It is understood that it cannot be said in this complicated case that there is no merit to an appeal. Nevertheless, after taking this into account, Garson J.A. stayed the appeal proceeding. The appellant was to meet the terms of Garson J.A.'s order before the respondent would be put to the prejudice of preparing for the appeal, and to the prejudice of the delay an appeal would cause her.
- [32] The appellant's second argument is really just another attempt to vary Garson J.A.'s order. The appellant has already sought to vary Garson J.A.'s order but was unsuccessful. If I was to accede to this argument, I would be undermining the authority of this Court. I do not accede to this argument.

Financial Circumstances of the Appellant

- [33] As for the third point, the appellant submits he has had financial difficulties complying with the order, but perhaps he might be able to do so in the future, if he was to sell one of his properties. He suggests that any order for sale would have to be dealt with in the trial court, and that could take some time, but if and when that happens, arrangements then could be made to pay the amounts he was ordered by Garson J.A. to pay.
- [34] In my view, the appellant has not provided any evidence of a change in circumstances since the hearing before Garson J.A. that would prevent him from complying with her order. Much of the evidence relied upon by the appellant regarding his financial circumstances predates the ruling of Garson J.A. I find his affidavit evidence to be rather piecemeal and incomplete, which makes it unconvincing given the findings of the trial judge as to his serious lack of credibility, his history of not complying with court orders, and his wealth.

- [35] As pointed out by the respondent, the evidence the appellant has provided in fact suggests the appellant made deliberate choices to delay in selling properties in Singapore that were ordered sold and available to be sold.
- [36] One of these properties in Singapore is known as the Goodwood property. In 2018, there was an order in the trial proceeding of this matter that the property be sold, but it still has not been sold.
- [37] Unbeknownst to the respondent, the appellant received an offer to purchase the Goodwood property in July 2019, for \$4.525 million SGD. The exchange rate between the Singapore dollar and Canadian dollar is close to equivalent. There is a mortgage of less than \$1 million SGD on that property, so even generously considering expenses related to the sale, there would have been over \$3 million SGD available, roughly, had that offer been accepted. The appellant turned down the offer, and did not advise Garson J.A. of it. He received another offer on that property in January 2020, for around the same price. He did not advise the respondent or this Court of that offer when he applied to vary the order of Garson J.A., despite his arguments that he was financially unable to comply with the order.
- [38] The appellant has revealed that in early April 2020, the offer to purchase the Goodwood property was still available. He suggests that it is only because the respondent has a caveat on the property that he cannot sell it. The respondent disputes that notion. Respectfully, the notion that a caveat would defeat the sale, rather than simply be a matter to accommodate on the sale, is not credible.
- [39] In fact, the evidence reveals that rather than doing what he could to facilitate the sale of the Goodwood property as soon as possible, the appellant has tried to leverage his non-payment of the trial judgment, and the conditions of the extension of time order, in order to obtain the respondent's agreement that he be permitted to pay himself \$500,000 cash from the sale, as a condition of that sale. This is striking in the face of his non-payment of any part of the trial judgment.
- [40] The strong inference available on the evidence, is that the appellant has had the ability to sell the Goodwood property since July 2019, but has chosen not to do so. I am not persuaded he has made a good faith effort to comply with the conditions of the extension of time order, and I am not persuaded he is unable to comply. Even as of the date of this hearing, the appellant has no clear proposal as to how and when he will comply with the terms of the order; seeking to have this Court defer that as a matter to be negotiated with the respondent, dealt with by the trial court, or dealt with by the division hearing the appeal proper.

- [41] The appellant also suggests, in his affidavit, that due to the COVID-19 pandemic, he is no longer able to earn an income from his medical practice, and it is more difficult for him to sell some of his real estate. However, I do not see that as a reason not to enforce the terms of the extension of time order. The Goodwood property sale would have allowed him to meet the conditions of the extension of time order had he been willing to sell the property, but, as noted, he chose not to facilitate that sale.
- [42] As for other properties which the appellant had the ability to sell, he claims in his affidavit that he has attempted to do so with no luck. However, the respondent has put forward evidence that the online listings of the Goodwood property, and two other Singaporean properties at issue, include a statement as follows: "We Are Sorry, But It Seems The Owner Is No Longer Accepting Enquires At The Moment."
- [43] In short, there is nothing new in the thrust of the appellant's arguments as to his ability to make the payments ordered by Garson J.A., which arguments have already been made and rejected. He does not suggest a timeline of when he will make the payments. All of the same factors that supported the making of the conditional extension of time order in the first place continue to exist. The appellant has made choices not to comply with the conditions of the extension of time order.

Additional Discussion

- [44] In considering the present application, it is not appropriate for me to revisit the conclusions already reached by Garson J.A., as upheld by the division which heard the application to vary her decision. Justice Garson already concluded that:
- a) there was prejudice to the respondent if the extensions of time were granted and there were further delay;
 - b) there was ample evidence that the appellant refused to comply with and frustrated court orders, and his conduct in the litigation had been "appalling";
 - c) the prejudice to the respondent could be ameliorated if conditions were imposed on any extensions of time; and
 - d) the appellant's arguments and evidence to the effect that he could not satisfy the conditions were rejected.
- [45] In applications of this nature, the common theme running throughout the jurisprudence is the question of whether it is in the interests of justice to grant the relief sought.
- [46] In the context of today's application, that requires considering whether there is a reasonable explanation for the appellant's non-compliance with the extension of time order, which would change the balance of the interests of justice that have already been determined, such as a compelling change in circumstances, for example. I am not persuaded there is any reasonable explanation for the appellant's non-compliance with the extension of time order.

[47] I, therefore, see it as in the interests of justice to grant the order sought. The appeal is dismissed as abandoned pursuant to s. 10(2)(e) of the Act, due to the failure of the appellant to meet the conditions of the order of Garson J.A. extending time.

[48] Costs will be in the normal course to the respondent.

"The Honourable Madam Justice Griffin"

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Prepared on 25 October 2026 · Esheria